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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITHKLINE CORPORATION,

Petitioner

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a contractor's cost records are "directly pertinent" to a procurement contract, within the meaning of 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), when the contract price was fixed without reference to the contractor's costs under procurement statutes that accept prices established in the public marketplace as fair prices for government purchases.

2. Whether the access-to-records authority granted to the Comptroller General by 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) to audit particular procurement contracts to detect fraud or other improprieties may be used to demand access where no such impropriety has occurred, and where the purpose of the demand is otherwise unauthorized by the statutes.

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SmithKline Corporation ("SmithKline")[1] cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit

[1] SmithKline's non-wholly-owned subsidiaries and affiliates, listed here in compliance with Rule 28.1, are Allergan S.A.; Allergan Canada; Allergan de Colombia S.A.; Allergan Ltd.; Allergan Productos Farmaceuticos Ltd.; Pharma-Allergan Vertrieb GmbH; Sauten-Allergan; Nelson Res. & Dev. Co.; Charles Rives Part.; Xonics Inc.; Branson Sonic Power S.A.; Edmonton Labs. Ltd.; Franklin Off. Assoc.; Franklin Partnership; Franklin Plaza Assoc.; Franklin Town Corp.; K.B.S.A.; Krautkramer Japan Co.; MedLab Holdings; Oak Internat'l Ltd.; SmithKline Instru. Co.; Walnut Ins. Co.; Wells-Krautkramer Ltd.; Branson Sonic Power Co. (S.A.) (Pty.); A. J. White Pty.; SK&F Labs, S.A.; SmithKline-RIT; SmithKline & French Canada Ltd.; Menley & James Ltd.; Surel Sutures; Laboratories SmithKline & French S.A.; SmithKline & French Laboratories Ltd.; SmithKline & French Pension Trustees Ltd.; SmithKline & French Research Ltd.; Laboratories Gremy-Longuet; Smith Kline

in this case. SmithKline urges that, as the Court has previously done in a similar case,[2] the cross-petition should be granted if the Court grants the petition filed on behalf of respondents in *Bowsher* v. *SmithKline Corporation*, No. 81-2082 (filed May 10, 1982). SmithKline does not oppose the granting of that petition.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[3] is reported at 668 F.2d 201. The opinion of the district court (Pet. App. C) is reported at 483 F. Supp. 712.

Dauelsberg GmbH; Smith Kline & French Hellas S.A.; SK&F India; Chemico Pharmaceuticals; Smith Kline & French S.p.A.; Labs Julian de Mexico; Norden de Mexico; Smith Kline & French Nigeria; Smith Kline & French of Pakistan; Cainta Realty Corp.; SmithKline & Fujisawa K.K.; Fujisawa SmithKline Corp.; Smith Kline & French (Victoria Valley); Smith Kline & French Portgueso Productos Farmaceuticos; A. S. Ruffel (Private) Ltd.; Smith Kline Animal Health (S.W.A.) Ltd.; Smith Kline Antibioticos S.A.; Smith Kline & French (Switzerland) Ltd.; Smith Kline Dauelsberg Verwaltan GmbH; Smith Kline & French S.A.; Beckman Instruments Process-Gerate GmbH; Beckman Instruments Analytiques S.A.; Beckman Instruments International, S.A.; Beckman Instruments France S.A.; Beckman Instruments (Holding) Ltd.; Beckman Instruments Ltd.; Beckman Instruments (Nederland) B.V.; Beckman Instruments (Belgium) S.A.; Beckman - RJJC Limited; Beckman Instruments (Hong Kong) Ltd.; BICOMP, S.A. de C.V.; Beckman Instruments de Mexico, S.A. de C.V.; Beckman Instruments (Proprietary) Limited; Beckman (UK) Pension Trustees Limited; Beckman Instruments (Australia) Pty. Ltd.; Beckman Instruments Superannuation Pty. Ltd.

[2] *Bowsher* v. *Merck & Co., Inc.*, No. 81-1273 (cert. granted Apr. 19, 1982); *Merck & Co., Inc.* v. *Bowsher*, No. 81-1472 (cert. granted Apr. 19, 1982).

[3] References to "Pet. App." refer to the appendices to respondents' petition for a writ of certiorari in No. 81-2082.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on December 28, 1981. On March 19, 1982, the time for the filing of a petition for a writ of certiorari was extended to and including May 10, 1982. Respondents filed such a petition on May 10, 1982. SmithKline files this cross-petition pursuant to Rule 19.5. The Court has jurisdiction over the cross-petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. 2313(b) provides:

> "Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."

41 U.S.C. 254(c) provides:

> "All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency

head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—

"(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

"(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

"If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable."

STATEMENT

The court of appeals found that the General Accounting Office ("GAO") has sought access to SmithKline's confidential cost records because two Senators and their staff assistants wish to release those data publicly. Pet. App. 3a-4a. SmithKline and five other manufacturers were selected for this purpose because they had previously volunteered to assist GAO by providing information. *Id.* When the Senators would not be satisfied unless the manufacturers released detailed data without assurances of confidentiality, GAO issued statutory demands. *Id.*

GAO does not claim that SmithKline has made any excess or unfair profits, that any impropriety has oc-

curred, or that there has been any violation of law. *Id.* at 5a. It selected the procurement contracts upon which its demand is based randomly among many similar contracts for the sale of items by SmithKline to the Government.

The court of appeals rejected GAO's sweeping interpretation of the statutes upon which it relies. It recognized that "the primary concern" of Congress in enacting those statutes was to permit access to records "in cases of suspected fraud and profiteering." *Id.* at 7a. It acknowledged that the legislative history "manifests a strong congressional intent to prevent unlimited 'snooping'." *Id.* at 20a. The court held that GAO's interpretation places "no doctrinal limitation" on its access powers, *id.* at 22a, and concluded that it "is inconsistent with the congressional intent and is entitled to no deference." *Id.* at 22a-23a.

Nonetheless, the court of appeals permitted GAO access to records of SmithKline's manufacturing costs, manufacturing overhead, royalty expenses, and delivery costs. It denied GAO access to records regarding costs of research and development, marketing and promotion, distribution and administration. *Id.* at 27a.

REASONS FOR GRANTING THE CROSS-PETITION

SmithKline believes that the issue presented by the petition in No. 81-2082 was correctly decided by the court of appeals. The narrow and specific purposes of the statutes upon which the Government relies show clearly that the court properly declined to permit a virtually limitless review by GAO of confidential cost records that cannot be "directly pertinent" to the non-cost-based procurement contracts involved here. Nonetheless, because that same

issue is already before the Court in a similar case,[4] SmithKline does not oppose the granting of the petition in No. 81-2082. If certiorari is granted, however, this cross-petition should also be granted to review two closely-related questions that are necessary to resolve fully the dispute presented in this case. For reasons set forth in SmithKline's brief in response to the petition in No. 81-2082, this case should be set for argument at the same time as *Merck*, in which a similar cross-petition has already been granted.

First, SmithKline urges that no cost records can be "directly pertinent" to the non-cost-based procurement contracts upon which GAO's demand is based. The prices provided for in those contracts were derived from published catalog prices at which standard commercial items were sold to the public, or from other evidence of adequate price competition, without reliance upon underlying manufacturing or other costs.[5] The only records that could conceivably be "directly pertinent" to such fixed-price contracts are those evidencing the catalog or competitive prices, the level of discount, the deliveries and the payments. If SmithKline is correct in this interpretation of the statutory provisions, the court of appeals erred in permitting GAO access to additional records, and the judgment below should be appropriately narrowed.

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[4] *Bowsher* v. *Merck & Co., Inc., supra; Merck & Co., Inc.* v. *Bowsher, supra.*

[5] The Truth-in-Negotiations Act, 10 U.S.C. § 2306(f), provides that contractors need not supply cost data to a government agency in connection with procurements "where the price negotiated is based on adequate price competition" or "established catalog or market prices of commercial items sold in substantial quantities to the general public."

Second, SmithKline urges that the Comptroller General exceeded his statutory authority by demanding access to SmithKline's confidential cost records for purposes other than those for which the authority was granted. The legislative history of the access-to-records provisions shows that they were enacted for the narrow purpose of deterring or detecting fraud or other abuses of the negotiation process by permitting GAO to audit particular procurement contracts.[6] GAO has never claimed that any such abuse or impropriety has occurred. Pet. App. A at 5a. Far from seeking to audit particular procurement contracts in search of improprieties, GAO has randomly selected contracts merely as a facade for the conduct of a research study regarding the economics of the pharmaceutical industry.[7] Because "neither the contract clauses nor the statutes were designed to serve" such a purpose, the demand made upon SmithKline by the Comptroller General exceeds his statutory authority.[8]

Fairness and considerations of sound judicial administration require this cross-petition to be granted. Without the additional questions presented here, the Court will have before it only part of the issues of statutory construction raised by GAO's demand. The additional

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[6] For example, the sponsor of the provisions declared that the "main purpose" was to create a "deterrent to improprieties in the negotiation of government contracts," 97 Cong. Rec. 13198 (1951) (remarks of Rep. Hardy), and stated that the legislation was designed to enable GAO "to make effective audits." *Id.* at 12611.

[7] The court of appeals found that GAO's "sole reason" for resorting to the demands was its inability in any other way to satisfy the Senators, Pet. App. at 5a, and "assum[ed]" that GAO intended to conduct an "economic study of the pharmaceutical industry." *Id.* at 11a.

[8] *Eli Lilly & Co.* v. *Staats*, 574 F.2d 904, 924 (7th Cir.) (Pell, J., dissenting), *cert. denied*, 439 U.S. 959 (1978).

questions presented here concern precisely the same statutory provisions involved in respondents' petition, and their consideration will not materially increase the burdens upon the Court or parties. Moreover, granting respondents' petition alone would deny the Court an opportunity to consider all the alternative dispositions otherwise available, and would restrict its resolution of the dispute merely to the result reached below or to respondents' sweeping demand for essentially limitless access. This would be particularly unfair here, where the Court already has *Merck* before it, including a cross-petition raising these same issues, and where denial of this cross-petition could lead to unjustifiably different results in similar cases.

CONCLUSION

If review is granted in No. 81-2082, this cross-petition should also be granted and the case set for argument at the same time as *Merck*.

Respectfully submitted,

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

The government's petition in No. 81-2082 and SmithKline's cross-petition in No. 81-2268 raise precisely the same legal issues that are presented in *Bowsher* v. *Merck & Co.*, cert. granted, Nos. 81-1273 and 81-1472 (Apr. 19, 1982).

Both petitions should be held pending this Court's decision on the merits in *Merck* and then disposed of in a manner consistent with that decision. No useful purpose would be served by full briefing and oral argument of the identical issues presented in *SmithKline*.[1] Indeed, if the Court were to accept SmithKline's suggestion and grant the

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[1]The cases cited by SmithKline (81-2082 Br. in Opp. 4 n.3)—*Baxter* v. *Palmigiano*, cert. granted, 421 U.S. 1010 (1975), and *Enomoto* v. *Clutchette*, cert. granted, 421 U.S. 1010 (1975)—although similar, involved legal and factual situations sufficiently disparate (challenge to

instant petitions so the case could be argued in tandem with *Merck*, it would require the oral argument in *Merck* to be rescheduled for a later date. There is no justification for such postponement. Should SmithKline wish to supplement the arguments to be presented by Merck it may do so as amicus curiae in Nos. 81-1273 and 81-1472.

It is therefore respectfully submitted that the petition in No. 81-2082 and the cross-petition in No. 81-2268 should be held pending the decision in *Bowsher* v. *Merck & Co.*, Nos. 81-1273 and 81-1472, and should then be disposed of as appropriate in light of that decision.

REX E. LEE
Solicitor General

JULY 1982

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procedures used in prison disciplinary proceedings in California and Rhode Island) to warrant plenary treatment of both cases, thus assuring a full hearing on all issues. See *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976). Here, in contrast, the meaning of the same statutory and contractual provisions is at issue in both cases. No additional light would be shed on the issue by the *SmithKline* record or by additional briefing and argument in *SmithKline*.